DOCKET NO. UWY CV-14-6026552 S	:	SUPERIOR COURT
NUCAP INDUSTRIES INC., ET AL	:	J. D. OF WATERBURY
VS.	:	AT WATERBURY
PREFERRED TOOL AND DIE, INC., ET AL	:	SEPTEMBER 29, 2015

MEMORANDUM OF DECISION ON PLAINTIFFS' PARTIAL MOTION TO DISMISS DEFENDANT BOSCO'S COUNTERCLAIMS (#132)

This commercial dispute is before the court concerning the plaintiffs Nucap Industries, Inc. and Nucap US, Inc.'s partial motion to dismiss Counts One through Four of defendant/counterclaim plaintiff Robert A. Bosco, Jr.'s counterclaims (#126).[1] Bosco filed an objection thereto (#142), in response to which the plaintiffs filed a reply brief (#146). Oral argument on the plaintiffs' motion was heard by this court on September 7, 2015. After consideration, the court issues this memorandum of decision.

The plaintiffs contend that, on the grounds of improper venue, Counts One through Four should be dismissed, since these exact claims were previously dismissed by the court (*Roraback, J.*) by memorandum of decision, dated October 10, 2014, in *Bosco* v. *Eyelet Tech Nucap Corp.*, Superior Court, judicial district of Waterbury at Waterbury, Docket No. UWY CV 14 6023433. See plaintiffs' Exhibit A (decision). The plaintiffs also seek sanctions against Bosco and his counsel, for bringing again the identical claims that the court previously dismissed.

[1]For ease of reference, the court refers below to the plaintiffs collectively as "Nucap."

I

Background

In their two count complaint, the plaintiffs, who are engaged in the manufacture and design of brake components and other brake products, bring claims against Bosco and defendants Preferred Tool and Die, Inc. and Preferred Automotive Components, a division of Preferred Tool and Die (collectively, "Preferred"). The plaintiffs' claims are for misappropriation of trade secrets and for breach of a Confidentiality and Intellectual Property Agreement (Intellectual Property Agreement), between Bosco and Anstro Manufacturing, Inc., as to which plaintiff Nucap US, Inc. is alleged to be the successor. See plaintiffs' Exhibit G.

The plaintiffs assert that Preferred and Bosco are using and/or threatening to use Nucap's trade secret information in the design, development, manufacturing and marketing of competitive products, without Nucap's express or implied consent. See complaint, Count I, ¶ 79. The plaintiffs also allege that Bosco has breached the terms of the Intellectual Property Agreement by disclosing confidential information to Preferred without authorization. See complaint, Count II, ¶ 86. The plaintiffs seek an injunction, compensatory damages, and other relief.

For ease of reference, since a significant portion of the background is set forth in the decision, pages 1-3, the court cites it here, noting that there, Bosco was referred to as the plaintiff: "In his four-count complaint, the plaintiff alleges the following facts. The plaintiff is an individual residing in Wolcott, Connecticut. NUCAP is an Ontario corporation with a principal place of business in Toronto, Ontario, Canada. ETNC, a wholly owned subsidiary of NUCAP, is a corporation organized under the laws of the state of Delaware, with a principal

place of business in Connecticut and is registered as a foreign corporation conducting business in Connecticut.

'The plaintiff was a co-manager and 50 percent owner of Eyelet Tech, LLC (Eyelet Tech), a Connecticut limited liability company. On November 19, 2009, the plaintiff and his co-owner sold Eyelet Tech to NUCAP and ETNC, pursuant to an Asset Purchase Agreement, wherein ETNC purchased certain assets and assumed certain liabilities of Eyelet Tech. As part of the sale transaction, the plaintiff entered into a Confidentiality, Non-Competition and Non-Solicitation Agreement (Non-Competition Agreement) with ETNC and NUCAP, which was also executed and made effective on November 19, 2009. The restrictions under the Non-Competition Agreement were effective for five years and would expire on November 19, 2014, or would become void in the event of a default by the defendants of their obligation under the Asset Purchase Agreement or the Non-Competition Agreement between the parties. As consideration for these restrictions in the Non-Competition Agreement, ETNC agreed that it would pay the plaintiff the gross amount of $1,000,000 in five equal annual installments (Covenant Payments).

'The plaintiff, as part of the sale transaction in November of 2009, entered into an employment agreement with Anstro Manufacturing, Inc. (Anstro), another wholly owned subsidiary of NUCAP.[2] On January 23, 2012, the plaintiff's employment with Anstro ceased. The plaintiff entered into negotiations with NUCAP, and, on May 31, 2012, entered into a Confidential Separation Agreement and General Release (Separation Agreement), which set forth the terms of the plaintiff's separation from Anstro. Under section 7(b) of the Separation

[2]Plaintiff Nucap US Inc. is alleged to be the successor to Anstro.

Agreement, NUCAP and the plaintiff ratified the parties' obligations to each other under the Non-Competition Agreement. Additionally, section 15 of the Separation Agreement provided that, in the event of breach of any party's obligations under that agreement or any of the agreements referenced in the Separation Agreement, the non-breaching party had the right to recover attorneys fees and costs. Section 17 of the Separation Agreement set forth the choice of law for that agreement, which stated that Connecticut law would govern the enforcement of the Separation Agreement. Section 18 of the Separation Agreement provided that all actions or proceedings arising out of or related to the Separation Agreement would be litigated exclusively in Connecticut courts.

'On November 11, 2013, the plaintiff received a letter from NUCAP, inquiring about certain actions of the plaintiff that may have been in violation of the Non-Competition Agreement. The plaintiff denied these allegations. Subsequently, on November 18, 2013, the plaintiff received notice from NUCAP that it had deemed him to be in violation of the Non-Competition Agreement. The defendants, based on these alleged violations, refused and continue to refuse to make Covenant Payments to the plaintiff. The plaintiff further alleges that he has fulfilled and continues to comply with his obligations to the defendants under the Non-Competition Agreement.

'In counts one through four of the complaint, the plaintiff alleges breach of contract, breach of the guaranty against NUCAP, breach of the covenant of good faith and fair dealing against NUCAP and ETNC, and violations of General Statutes § 42-110b et seq., the Connecticut Unfair Trade Practices Act (CUTPA), against NUCAP and ETNC, respectively."

In addition, in the decision, the court explained that, while the plaintiff argued that Connecticut was the proper venue because the Separation Agreement between the parties, which ratified and incorporated the Non-Competition Agreement, contained a forum selection clause indicating jurisdiction here, "the plaintiff pursues various causes of action for alleged violations of the Non-Competition Agreement. There is no allegation that the defendants violated specific provisions of the Separation Agreement. In support of his position that section 18 of the Separation Agreement controls the forum selection of this lawsuit, however, the plaintiff directs the court to section 7(b) of the Separation Agreement, which provides, in relevant part: '[The plaintiff] hereby ratifies and confirms that he is obligated to comply with certain continuing obligations contained in [the Non-Competition Agreement] by and among [the plaintiff and the defendants] dated as of November 19, 2009, which is incorporated herein by reference.' This language, the plaintiff suggests, allows the court to infer that the parties intended the Separation Agreement to supersede provisions of the Non-Competition Agreement. This court, however, will not make that inference as the plain and unambiguous language of section 7(b) indicates only that the plaintiff is still obligated to comply with the provisions of the Non-Competition Agreement. There is no indication that the parties intended that by 'incorporating by reference' the Non-Competition Agreement into the Separation Agreement, that all of the provisions contained within the Non-Competition Agreement were superseded by the Separation Agreement." *Bosco* v. *Eyelet Tech Nucap Corp.*, supra, Superior Court, Docket No. UWY CV 14 6023433.

As Judge Roraback explained, "The Non-Competition Agreement provides in section 6: 'Choice of Law and Forum. This Agreement shall be construed in accordance with and

governed by Connecticut law without reference to the conflicts or choice of law principles thereof. Any litigation arising out of or relating to this Agreement shall be filed and pursued exclusively in the State or Federal courts in the County of New York, New York, and the parties hereto consent to the jurisdiction of and venue in such courts.'" Id.

Further, the court stated, "Because the plaintiff's cause of action is brought pursuant to alleged violations of the Non-Competition Agreement, and not for violations of the Separation Agreement, the Non-Competition Agreement controls the present litigation. Additionally, the Separation Agreement does not indicate that it supersedes all previous agreements of the parties. It only indicates that the obligations under other agreements, including the Non-Competition Agreement, are ratified and confirmed, and therefore continue. This court concludes that the present matter was brought in an improper venue, pursuant to the forum selection clause of the Non-Competition Agreement." Id.

Here, similarly, Bosco's counterclaims are set forth in four counts, for breach of contract, breach of the guaranty against Nucap, for breach of the covenant of good faith and fair dealing, and for unfair competition and trade practices under CUTPA. In substance, these claims are also the subject of Bosco's pending counterclaims in an action commenced by Nucap in the Supreme Court of the State of New York, *Nucap Industries, Inc.* v. *Robert Bosco, Jr.*, Index No. 651968/2014 (New York action). See plaintiffs' Exhibit D (Bosco's New York counterclaims).

Additional references to the factual and procedural background are set forth below.

II

Standard of Review

"The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . ." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200, 994 A.2d 106 (2010).

"When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . In contrast, if the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss . . .; other types of undisputed evidence; . . . and/or public records of which judicial notice may be taken; . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . .; the plaintiff need not supply counteraffidavits or

other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . . Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Conboy v. State*, 292 Conn. 642, 651-52, 974 A.2d 669 (2009).

Here, an evidentiary hearing was not requested by any party. As to the issues raised by the motion, there is no factual dispute presented.

III

Discussion

"[C]ourts have concluded that forum selection clauses do not oust courts of their jurisdiction, but they have been willing to enforce such contract clauses as long as they were reasonable by declining to exercise jurisdiction over an action in certain circumstances. . . . The United States Supreme Court took the lead on this issue in *Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), in which the court rejected the traditional view that forum selection clauses are unenforceable as contrary to public policy. The court stated that '[t]he argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction.[']" (Citations omitted.) *Reiner, Reiner & Bendett, P.C.* v. *The Cadle Co.*, 278 Conn. 92, 101, 897 A.2d 58 (2006). "The existence of such a clause does not deprive the trial court of personal jurisdiction over the parties, but presents the question whether it is reasonable for the court to exercise its jurisdiction in the particular circumstances of the case." Id., 103. Regarding venue, the Supreme Court also cited

Lambert v. *Kysar*, 983 F.2d 1110, 1118 n. 11 (1st Cir. 1993) ("It is well established that a forum selection clause does not *divest* a court of jurisdiction or proper venue over a contractual dispute."). (Emphasis in original.) *Reiner, Reiner & Bendett, P.C.* v. *The Cadle Co.*, supra, 278 Conn. 102. "[A]bsent a showing of fraud or overreaching, such forum clauses will be enforced by the courts." (Internal quotation marks omitted.) Id., n.9.

"[J]udges of the Superior Court have adopted a two-part analysis to determine whether a forum selection clause should be enforced. First, the court must look to contract formation itself to ascertain whether the clause was the product of fraud or deception or whether the bargaining power of the parties was so out of balance that the clause should not be enforced . . . This step allows, *inter alia*, consideration [of] whether the provision is contained in an adhesion or take or leave it contract which the party was compelled to accept without argument or discussion . . . . Second, the court considers whether, even if there existed no fraud, deception, or significantly uneven bargaining power, enforcement of the clause would cause such inconvenience to [a party] that the otherwise valid contractual provision should not be enforced." (Internal quotation marks omitted.) *Bongo International, LLC* v. *Bernstein*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 13 6038740 (December 20, 2013, *Hartmere, J.T.R.*).

"It is axiomatic that courts do not rewrite contracts for the parties." (Internal quotation marks omitted.) *Gibson* v. *Capano*, 241 Conn. 725, 732, 699 A.2d 68 (1997).

"Whatever inconvenience [the respondent] would suffer by being forced to litigate in the contractual forum as it was agreed to do was clearly forseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all

practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust or unreasonable to hold that party to his bargain." *Bremen* v. *Zapata Off-Shore Co.*, supra, 407 U.S. 17-18. In *Reiner, Reiner & Bendett, P.C.* v. *The Cadle Co.*, supra, 278 Conn. 103, the court found the reasoning in *Bremen* to be persuasive.

Here, Bosco presents no argument concerning contract formation and does not argue that litigating in New York would be gravely difficult and inconvenient or that he will be deprived of his day in court.

A

Exhibits

Bosco first asserts that the court may not consider the plaintiffs' exhibits, since no affidavit attesting to the terms of the Non-Competition Agreement and the Separation Agreement was submitted when the motion was filed. With their reply, the plaintiffs filed an affidavit of counsel (#147), which attested that the plaintiffs' exhibits are true and correct copies. Bosco does not dispute their authenticity.

As stated above, on a motion to dismiss, where the complaint is supplemented by undisputed facts, the court may consider the supplementary undisputed facts. See *Conboy* v. *State*, supra, 292 Conn. 651-52; *Cavanaugh* v. *Sherberg*, Superior Court, judicial district of New Haven, Docket No. CV 11 6023677 (February 2, 2012, *Fischer, J.*) (court may consider supplemental affidavit). Accordingly, the court may consider the plaintiffs' exhibits.

B

Forum Selection

Nucap argues that there is no substantive difference between Bosco's counterclaims here and the claims which were previously dismissed. Nucap contends that the four counterclaims exclusively derive from its alleged breach of the Non-Competition Agreement and nothing therein is even tangentially related to the trade secrets allegations set forth in the complaint against Bosco and Preferred.

In response, Bosco argues that the parties to this action and those in the previously dismissed action are different, in that in the prior action Eyelet Tech Nucap Corp. (ETNC) was a defendant, while here Nucap US, Inc. is a plaintiff. Bosco presents no reasoning as to why this difference in parties has any material significance.

Bosco also argues, without citation to the pleadings, that the claims are not identical and his present counterclaims make specific reference to the Separation Agreement, which provides that Connecticut is the proper forum, as the basis for the counterclaims. However, review of the counterclaims shows that all that has been added as to the Separation Agreement are conclusory references thereto. See Count One, ¶ 31; Count Three, ¶¶ 41, 44; Count Four, ¶ 49.

Bosco also contends that the Intellectual Property Agreement was confirmed and ratified in the Separation Agreement. See Separation Agreement, ¶ 7c. As Judge Roraback concluded regarding the Non-Competition Agreement, the Separation Agreement does not supersede the Intellectual Property Agreement.

Bosco also asserts that Nucap has placed the Non-Competition Agreement at issue in the present litigation, by intermingling claims under the Intellectual Property Agreement with claims involving a breach of the Non-Competition Agreement. The only specific reference cited in support of this portion of Bosco's argument is paragraph 36 of the complaint. In that paragraph, the plaintiffs generally allege that, as part of its effort to protect trade secrets, confidential, and proprietary information, Nucap requires certain employees, including Bosco, to execute employment and/or non-competition agreements, which require them to keep such information in confidence. The complaint is not premised on claims of violation of the Non-Competition Agreement.

In contrast, Bosco's counterclaims arise out of or relate to the Non-Competition Agreement, and are subject to its forum selection clause, quoted above. As stated above, Bosco is currently pursuing these claims in the New York action. As part of that litigation Bosco propounded an interrogatory to Nucap (see Bosco's Exhibit A, Interrogatory No. 7) concerning Nucap's allegations there, that Preferred is developing products which would directly compete with Nucap, and Nucap's response referred to the allegations made in the complaint in this action. Nucap's discovery response in the New York action is not evidence that the plaintiffs have averred that any alleged damages they suffered from an alleged breach of the Non-Competition Agreement are predicated on the outcome of this litigation.

Bosco has not shown that Judge Roraback's analysis should not be followed here. Bosco's counterclaims must be filed and pursued exclusively in New York. Under these circumstances, the court declines to exercise jurisdiction over Counts One through Four of Bosco's counterclaims. See *Reiner, Reiner & Bendett, P.C.* v. *The Cadle Co.*, supra, 278 Conn.

101.

C

Sanctions

The plaintiffs seek sanctions against Bosco and his counsel for their alleged harassing conduct, in disregarding Judge Roraback's prior order by filing claims identical to those previously dismissed. In support, they cite *Millbrook Owners Association* v. *Hamilton Standard*, 257 Conn. 1, 9-10, 776 A.2d 1115 (2001) (trial court has "the inherent authority to impose sanctions against an attorney and his client for a course of claimed dilatory, bad faith and harassing litigation conduct, even in the absence of a specific rule or order of the court that is claimed to have been violated." (Internal quotation marks omitted.)).

The Supreme Court recently stated that, in considering an award of sanctions based on nondiscovery litigation misconduct, a trial court should be guided by *Maris v. McGrath*, 269 Conn. 834, 845-46, 850 A.2d 133 (2004). See *Perry* v. *Perry*, 312 Conn. 600, 629, 95 A.3d 500 (2014).

In *Maris v. McGrath*, supra, 269 Conn. 844-46, the court stated, "It is generally accepted that the court has the inherent authority to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . . This bad faith exception applies, not only to the filing of an action, but also in the conduct of the litigation. . . . [T]he trial court must make a specific finding as to whether counsel's [or a party's] conduct . . . constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers to impose attorney's fees for engaging in bad faith litigation practices. .

. .

'To ensure . . . that fear of an award of attorneys' fees against them will not deter persons with colorable claims from pursuing those claims, we have declined to uphold awards under the bad-faith exception absent both clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes . . . and a high degree of specificity in the factual findings. . . . Whether a claim is colorable, for purposes of the bad-faith exception, is a matter of whether a reasonable attorney could have concluded that facts supporting the claim *might be established*, not whether such facts *had been established*. . . . To determine whether the bad faith exception applies, the court must assess whether there has been substantive bad faith as exhibited by, for example, a party's use of oppressive tactics or its wilful violations of court orders. . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.).

An improper purpose has been defined as "a purpose other than that of securing the proper adjudication of the claim on which [the proceedings] are based . . . ." (Internal quotation marks omitted.) *Fleming* v. *Bridgeport*, 284 Conn. 502, 536, 935 A.2d 126 (2007). As the parties seeking sanctions, the plaintiffs have the burden of proof. See *Munro* v. *Munoz*, 146 Conn. App. 853, 857, 81 A.3d 252 (2013). "Whether a party has acted in bad faith is a question of fact . . . ." (Internal quotation marks omitted.) Id., 861-62.

The court is mindful of the Supreme Court's recent admonition concerning the narrow scope of the bad faith exception, "that a litigant seeking an award of attorney's fees for the bad faith conduct of the opposing party faces a high hurdle." *Perry* v. *Perry*, supra, 312 Conn. 629.

There, the court reiterated that "*Maris* makes clear that in order to impose sanctions pursuant to its inherent authority, the trial court must find *both* that the litigant's claims were entirely without color *and* that the litigant acted in bad faith." (Emphasis in original; internal quotation marks omitted.) Id., 630.

After consideration, the court concludes that the plaintiffs have not met the heavy burden to provide clear evidence that Counts One through Four of Bosco's counterclaims were filed for an improper purpose. See *Maris* v. *McGrath*, supra. In view of this determination, the court need not make a finding as to the other aspect of the two part test set forth in *Maris* v. *McGrath*, supra, as to whether his filing was entirely without color.

CONCLUSION

For the reasons stated above, the plaintiffs' partial motion to dismiss Counts One through Four of Bosco's counterclaims is granted. Their request for an award of sanctions is denied. It is so ordered.

BY THE COURT

Robert B. Shapiro

ROBERT B. SHAPIRO
JUDGE OF THE SUPERIOR COURT

Copies mailed on 9/29/15 to:
✓ Robinson & Cole LLP
✓ Hinckley, Allen & Snyder LLP
✓ Brody Wilkinson PC
✓ St. Onge, Steward, Johnston & Reens
✓ Reporter of Judicial Decisions
by [illegible], Deputy Chief Clerk